APPENDIX A

MURRAH, Chief Judge.

This is an interlocutory appeal, under 28 U.S.C., §1292, from an Order denying Boeing Airplane Company's motion for summary judgment in a wrongful death action, based on the contention that the Administrator-plaintiff is no longer the real party in interest, under F.R.C.P., Rule 17(a).

The contention is founded on these facts. A Nebraska Administrator brought this diversity suit in the Kansas District Court for the wrongful death of his decedent in Nebraska. When the suit was commenced, the widow and minor child, for whose benefit it was brought, were receiving and continue to receive payments under the Federal Employees Compensation Act, 5 U.S.C., §751, 39 Stat. 742. After commencement of the suit, the United States Employees Compensation Commission exacted an "agreement" from the widow, pursuant to §26 of the Act. This section provides in material part that "* * * if an injury or death for which compensation is payable * * * is caused under circumstances creating a legal liability upon some person other than the United States to pay damages therefor, the Commission may require the beneficiary to assign to the United States any right of action which he may have to enforce such liability * * *, or the Commission may require said beneficiary to prosecute said action in his own name * * *." The agreement recited the substance of the statute, and then provided that, in consideration of the payments made under the Federal Employees Compensation Act on account of the death of James Warner Sullivan in Nebraska, while employed as

a Captain, USAF Reserve, the widow assigned, transferred, and set over to the United States all of her "right, title and interest in and to her claim for damages against Boeing Airplane Company * * * together with all rights of action thereunder." After the execution of this agreement, Boeing moved for summary judgment, contending in the trial court, as it does here, that the assignment by the widow on behalf of herself and her minor child, pursuant to the statute, precluded the Administrator from maintaining this action as the real party in interest.

Every civil action in the federal courts must, of course, be prosecuted in the name of the real party in interest. And, the "real party in interest" is the one who, under applicable substantive law, has the legal right to bring the suit. See: Hoeppner Construction Company v. United States, 287 F.2d 108. Accordingly, an Administrator may bring the suit in his own name without joining the parties for whose benefit it is brought, if by the law of the forum he may do so. See: F.R.C.P., Rule 17(a); third sentence, Rule 17(b); Federal Practice and Procedure, Barron & Holtzoff, Ch. 8, §486; and Moore's Federal Practice, Vol. 3, §17.18.

Kansas, the forum of this action, authorizes the Nebraska Administrator to bring this wrongful death action, if the Administrator could have maintained it under the law of Nebraska. See: Kansas G.S., 60-143; Russell v. Railway Co., 189 P. 367; and Williams v. Bridge and Iron Co., 206 P. 327. And see generally, Annot., 52 A.L.R.2d 1016. Under the law of Nebraska, where this right of action was created and arose, only the Administrator has the legal right to bring the action, "* * * for the exclusive benefit of the widow * * * and next of kin." Sec. 30-810, R.S. Nebraska, 1956. See: Russell v. New Amsterdam Casualty Company, 303 F.2d 674, citing Swift

v. Sarpy County, 167 N.W. 458; Lucky v. Union Pac. R. Co., 219 N.W. 802; and Goeres v. Goeres, 248 N.W. 75. In this diversity suit to enforce a state created right of action, the federal court, sitting as another state forum, enforces such right in accordance with applicable state law. See: Guaranty Trust Co. v. York, 326 U.S. 99.

Boeing concedes that absent the statutory assignment, the United States has no litigable interest in the suit and is, therefore, not a proper party to it. See: United States v. Klein, 153 F.2d 55; and Louisville & Nashville Railroad Co. v. Rochelle, 252 F.2d 730. It is thus clear that the Nebraska Administrator was and is the real party in interest, and the only person with the legal right to bring and maintain this suit; unless as Boeing contends, the widow's assignment of her right in the action, pursuant to federal statute, operated not only to transfer her beneficial interest in the right of action, but to subrogate the United States to the Administrator's right of action and supersede him, as the real party in interest.

If, of course, the assignment statute is designed to create or condition a federal right of action, any irreconcilable conflict resulting from incidence of state law must be resolved in favor of the supremacy of federal law. See: Free v. Bland, 369 U.S. 663; Braunstein v. Commissioner, 305 F.2d 949; and Case v. Bowles, 327 U.S. 92. But, this federal statute does not purport to create any right of action, or to provide a mode for enforcement of the state created right of action. The state has not only created the asserted right, but has designated the only person who may enforce it. Under the law of Nebraska, the designated Administrator is vested with the exclusive right to bring and control the litigation. See: Lucky v. Union Pac. R. Co., supra. By the assignment, the United States succeeded to the interest of the widow in the state created

right of action, i.e., it stands in the widow's shoes. And, it cannot acquire a greater right or different status than the widow-beneficiary and assignor.

The widow and next of kin were joined as parties plaintiff, but no one contends that they were authorized to bring this suit, or that they are necessary parties. While they are, to be sure, beneficiaries of the asserted right of action and entitled to the fruits of it, they had no right, under the controlling law of Nebraska, to bring, maintain or control the suit for enforcement of that right, in any court—State or Federal—and they, therefore, could not assign such right to the United States or anyone else. The statutory assignment had no effect whatsoever upon the exclusive right of the Nebraska Administrator to bring and maintain the suit. In these circumstances, we have no occasion to consider whether, under Rule 25(c), the action may be continued by them as original parties. The provision of the assignment statute, to the effect that the "* * * commission may require said beneficiary to prosecute said action in his own name," is likewise inapplicable. Since the Administrator is the real party in interest, we have no need to consider whether, under Rule 25(c), the action may be continued in the name of the Administrator after transfer of the widow's interest to the United States.

United States v. New York Foreign Trade Zone Operations, 304 F.2d 792, did recognize the right of the government to prosecute a suit against a third party, as assignee under §26, but there was no question of the right of the United States to do so, under the law of the state which created the right. Boeing also analogizes our case to the automatic assignment of "* * * all right of the person entitled to compensation to recover damages against such third person," under §33(b) of the Longshoremen's

And Harbor Workers' Compensation Act. But, no case is cited and we have found none interpreting this section of that Act to authorize the United States to sue in its own name, as assignee, when the law of the state wherein the right accrues specifically designates the only party authorized to bring the suit. We have no occasion to consider whether, as assignee before commencement of the suit, the United States could have brought it, contrary to the exclusionary provisions of the Nebraska statute. It is sufficient for the purposes of our case that the assignment was made after the suit was filed and, indeed, the United States does not assert the right to maintain it here.

The Order of the lower Court, denying the defendant's motion for summary judgment, is AFFIRMED, and the case is remanded for further proceedings.

APPENDIX B

Memorandum of Opinion

10] This is an action for wrongful death. The case is presently before the court upon defendant's motion for summary judgment.

The action was instituted by the widow, child and special administrator of James W. Sullivan for the recovery of damages ensuing from the death of James W. Sullivan allegedly caused by the wrongful act of the defendant.

The case is one of those which did not exist at common law and exists solely by virtue of statute. The Revised Statutes of Nebraska, 30-810, requires that the action shall be commenced within two years after the death of such person. This was done. James W. Sullivan died April 6, 1956, and the action was commenced on March 27, 1958. The Nebraska wrongful death statutes contain no maximum limits for recovery.

The widow of the deceased was receiving compensation under the Federal Employee's Compensation Act prior to the commencement of this action. More than two years after the injuries were sustained by the deceased, the widow was required by the Bureau of Employee Compensation of the United States to execute an assignment, designated an "agreement", which purported to sell, assign, transfer and set over to the United States of America all of the widow's right to claim for damages against Boeing and against any other parties other than the United States who may be legally liable to pay damages for said injury, together with all rights of action thereunder.

11] The defendant's motion for summary judgment is predicated on the proposition that the assignment transferred the cause of action now being prosecuted by the plaintiffs to the United States and that plaintiffs are therefore not real parties *and* interest.

The parties are apparently in agreement on four propositions. These are:

1. The action is governed exclusively by the Federal Employee's Compensation Act, 5 USCA 776, et sequentia.

2. Rule 17 (a) of the Federal Rules of Civil Procedure relating to assignment of claims has no application to cases of this type. (See United States v. Aetna Casualty, 338 US 366; 94 L. Ed. 171).

3. The widow of the deceased did on April 15, 1958, assign her claim against the defendant to the United States Government for the amounts expended by the Government under the Act.

4. The United States Government through the Department of Justice, did, on December 8, 1959 tell the plaintiffs to proceed with the prosecution of this action against the defendants.

Without quoting the pertinent portions of the statutes, 5 USCA 776 et sequentia, we agree that the statute provides:

1. The United States may require the beneficiary to assign to it any right of action he may have to enforce such liability against the third person; or

2. The United States may require such beneficiary to prosecute such action in his own name.

12] 3. The beneficiary who refuses to do what the Government directs that is assign the claim or prosecute

the action will lose his right to any compensation benefits under the Act.

The provision of the statute and the Code of Federal Regulations, 20 CRF ¶ 3.1, 3.2, 3.3 and 3.6, does not in our opinion bear out the contention of the defendant, to-wit: That the agreement of the widow to assign her cause of action to the United States had the effect of transfering the exclusive right to maintain the action from the widow to the United States. Indeed the contrary would appear to be the reasonable construction of the statute and regulations. The widow who received compensation from the United States was placed in a precarious position.

First, if she had not brought her action within the two year period provided by the Nebraska law she would be barred from future recovery under the Nebraska wrongful death statute.

Second, if she had not taken the step of protecting the Government by instituting the action against the defendant as a person having a legal liability other than the United States she would have had no rights to assign to the United States.

Third, the assignment was of a pending action and the United States retains control over it and may require the beneficiary to settle or compromise the claim which has been filed.

Fourth, if she had not brought the action within the statutory period and made the assignment she may have forfeited her rights for compensation from the United States Government.

The United States has in effect caused the plaintiffs to bring the action, caused them to assign the action to it, and is in position to control its outcome. While it is not

a party to the action, the United States has an interest in its outcome.

13] While the plaintiff and beneficiary, Colene C. Sullivan, executed an Agreement assigning her claim for damages to the United States, this assignment was made subject to the law in effect at the time it was made.

The statute, 5 USCA 776, and regulations 20 CER § 3.1, 3.2, 3.3 and 3.6 must be construed in light of the present record. We have found no cases nor have we been cited to any which are applicable in this instance. We would interrupt the statute and regulations to carry out their obvious purpose to protect both the employee's rights of action and the right of the United States to be subrogated to those rights.

Under the condition of the record before us at the present time the sustaining of a motion for summary judgment as requested by the defendant might well cause the widow to lose her right to compensation which she is presently receiving or place upon her an undue burden of sustaining her position as a beneficiary under the Federal Employee's Compensation Act.

It is our opinion therefore that under the facts and applicable law and regulations the plaintiffs are the real parties in interest and that the defendant's motion for summary judgment should be denied.

Prevailing parties will prepare and submit an appropriate order.

At Wichita, Kansas this 7th day of August, 1962.

Wesley E. Brown
Judge

Filed August 7, 1962

14] **Order**

Now on this 27 day of April 1962, the above entitled action comes on for hearing on defendant's motion for summary judgment, plaintiffs appearing by and through their attorney, William C. Farmer, and defendant appearing by and through their attorneys, Foulston, Siefkin, Powers, Smith & Eberhardt.

Thereafter, after duly considering the arguments, the Court finds that the motion for summary judgment should be overruled.

The Court further finds and is of the opinion that the instant order involves a controlling question of law as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

It Is Therefore Ordered that defendant's motion for summary judgment should be, and it is hereby, overruled.

15] Dated: September 10, 1962

Wesley E. Brown
District Judge

Approved:

William C. Farmer
Smith, Shay, Farmer & Wetta

William C. Farmer,
One of Plaintiffs' Attorneys

Foulston, Siefkin, Powers, Smith & Eberhardt

Gerald Sawatzky
One of Defendant's Attorneys

Filed September 10, 1962

APPENDIX C

Volume 53 of Congressional Record

History of H. R. 15316

May 11, 1916—Bill & Report No. 678 referred to Committee on Whole House 7839

June 30, 1916—Committee of the Whole House on the State of the Union—debate 10312-10317

July 12, 1916—Further debate 10885-10916

P. 10909: Mr. Barkley:

". . . The bill which has been presented by the committee has one or two features in it that I think ought to be changed. For instance, there is a provision in sections 26 and 27 that where an injury is brought about on account of circumstances that would make some third person liable in damages for the injury, in that case the Government has the right to require the injured employee to assign his right of action against the corporation or individual over to the Government or to prosecute it in his own name. Whether he prosecutes it in his own name, or whether the commission prosecutes it in his behalf, and a recovery is had, then the commission has the right to apply such of the amount recovered as may be necessary to reimburse the Government for what compensation it may have paid him up to that time and apply the balance of it, if any is left over, to any future compensation that the Government might be called upon to pay to the employee. "

P. 10910: Mr. Barkley:

". . . Now in the language of this bill, this would apply to any injury he might receive at any time in the future. If he was injured today by reason of the

negligence of anybody else, and he recovered, or the commission recovered for him, I think there ought to be taken out of the amount recovered by him . . ." . . ., etc.

P. 10912: Mr. Borland:

"Mr. Chairman, I notice that this section requires the beneficiary, or gives the commission the power to require the beneficiary, to assign to the United States any right of action he may have to enforce such liability for damages by reason of death or injury. I assume, as a matter of law, that they can only require that assignment as the alternative of receiving the money."

Mr. Gard:

"That is true."

Mr. Borland:

"They could not require the assignment of the right to pursue the damages against somebody else if that right were more valuable than the right to claim the damages for compensation from the Federal Government?"

Mr. Gard:

"That is true."

Mr. Borland:

"And so in the case of my own State, where the Campbell Act gives a penalty of $5,000 for negligence and death, if the party preferred to retain that right of action he could do so?"

Mr. Gard (Chairman of Committee):

"They have the right to take the compensation or pursue their own independent remedy for damages."

P. 10912: Mr. Van Dyke:

"Mr. Chairman, I should like to ask the gentleman a question. Who is authorized to bring suit in case of an accident to a Government employee? Do the commission handle all suits?"

Mr. Gard:

"Only on assignment. The man may bring suit himself. He has an independent right to bring it. In the event that he desires, the commission may bring it under assignment by him. Otherwise there would be no right in the commission or anyone else to bring suit."

Mr. Van Dyke:

"The only point I wanted to bring out was whether the commission . . . will have authority either to bring suit or to settle all claims?"

Mr. Gard:

"Only if the man injured wants to come within the compensation law."

Mr. Van Dyke:

"If he elects to come within the provisions of the compensation law, then he has to relinquish all right he may have to bring suit to recover, and this puts in the hands of one commission the authority to bring suits against every railroad company in the country and to handle all suits?"

Mr. Gard:

"It is just a matter of assignment. He would assign to the commission the claim for damages, and they would proceed to collect it according to law."

Mr. Van Dyke:

"Of course, I can not admit that such an assignment can be made. Under the law of our State an as-

signment of that kind cannot be made. I want to find out whether or not this commission will have authority to settle, in case the employee desires to have suit brought to recover damages?"

Mr. Gard:

"Yes; after assignment, I would say the commission would have the authority to prosecute the case, or settle it, in its discretion."

Mr. Van Dyke:

"That is what I wanted to know, whether the full power would be placed in the hands of the commission or not. . . ."

Mr. Cullep:

"In most jurisdictions a claim for personal injuries is not assignable."

Mr. Gard:

"That is very true."

Mr. Cullep:

"Now, are you creating such a right by statute here?"

Mr. Gard:

"Under this statute we are."

July 12, 1916—Passed House—P. 10915.

Remarks of Warren Gard, Chairman of Judiciary Committee reporting out bill—P. 1508—he wrote report 678.

SENATE

July 25, 1916—H. R. 15316 reported favorably by Committee on Education & Labor, with one amendment.

Report 733, Smith, chairman.

Debate mainly on amendments 12887—12092, passed August 19, 1916.

14158—Signed by President, September 8, 1916, after agreements on minor amendments.

House Report 678.

May 11, 1916.

P. 11 of Report: Mr. Gard:

"If the injury or death for which compensation is payable is caused by the negligence of some person other than the United States, the commission may require the beneficiary to assign to the United States any right of action he may have against such other person or to prosecute said action in his own name. If the commission realizes upon such cause of action, it shall, after deducting expenses and compensations already paid, pay any surplus to the beneficiary. If a beneficiary entitled to compensation pursues his right of action and realizes upon the same, he is required to credit upon compensations due from the United States the amount received from such other person."